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National Insolvency Forum

Toronto Regional Report

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Foreword

As a result of the numerous revisions made to the *Bankruptcy and Insolvency Act* (*BIA*) over the past seven years, it was felt that 1999 would be an ideal time to consult with various stakeholders and practitioners regarding the operational aspects of Canada's Insolvency System. At an early stage in the process of organizing the National Insolvency Forum (NIF), we realized that, in order for these consultations to be successful in focussing on the operational aspects of the Insolvency System, it was imperative that those participating possess a high degree of practical everyday *hands-on* experience. In other words, we wanted the NIF to be a Forum devoted to those practitioners and stakeholders who are the principal users of the system and who deal with the procedures and intricacies of the insolvency system on a daily basis. It is our opinion that the forum utilized has proved to be an ideal vehicle to accomplish our objectives and that the high degree of knowledge and expertise of participants has been an invaluable component to the success of these consultations.

Our Approach to the Challenge

In keeping with our mission of providing an effective, cost-efficient and uniform national program, as well as ensuring that the existing system is streamlined to better respond to stakeholders'needs, six (6) regions were selected to participate in the NIF initiative undertaken by the Office of the Superintendent of Bankruptcy (OSB).

The following Regional Report is one of six (6) reports which outlines the highlights of stakeholders' discussions and suggestions for changes and improvement to Canada's Insolvency System. A copy of the report will be forwarded to each participant and all reports will be published on the OSB web site (http://osb-bsf.ic.gc.ca). The National Report will be published in the upcoming *Insolvency Bulletin*.

In order to ascertain what works, what doesn't work, and what improvements can be made, stakeholders were asked to voice their concerns regarding the existing insolvency system.

In order to appropriately reflect the opinions and concerns expressed by the participants and stakeholders respectively, we have divided the Report in two (2) parts: *Part I* reflects the participants' discussions as to the efficiency of our existing system, including suggestions to streamline the process for consumer insolvencies, whereas *Part II* encompasses the participants' discussions on the same subject-matters, as they pertain to commercial insolvencies.

Finally, you will note that we have included in Appendix A a summary of various papers submitted by participants, as well as a list of the participants in Appendix B, for your perusal.

Part One
Consumer Insolvencies
Summary of Discussions & Key Points

1. Efficiency of the Current System

1.1. Streamlining the Existing System

With the millennium only a few months away and given the constantly changing nature of economic activity in Canada and throughout the world, it has now become imperative that Canada maintain a strong, vibrant and equitable insolvency system. The question then becomes *How efficient is our current insolvency system ?* To this end, both consumer and commercial representatives were invited to voice their views on a number of issues regarding ways to simplify the existing process and make it less time-consuming and more effective and cost-efficient.

The discussion opened with the issue of **Proof of Claims** ("poc "). On the one hand, creditors argued that as is, the process of substantiating a claim is onerous and time-consuming and submitted that oftentimes, given the low return attributed to unsecured creditors it was not worth the effort. On the other hand, some participants viewed the "poc" as an important document, necessary to validate a creditor's right to participate in the bankruptcy. As a means of streamlining the process, it was suggested that creditors be permitted to file electronically their "poc".

> *It was recommended that creditors be entitled to file the proof of claim electronically.*

On the issue of **Credit Rating Practices**, participants commented that the current system makes no distinction between those individuals who choose to file for bankruptcy and those who opt to file a proposal. It was, therefore, suggested that lenders and credit grantors amend their rating system in order to reflect a clear distinction between those individuals who have the financial means of filing a proposal and opt to do so, and those who choose to file for bankruptcy. For example, it was suggested that where an individual has the financial capabilities to reimburse 75% of his/her outstanding debt, in accordance with a proposal, that person's credit rating should

be representative of his/her efforts to comply with his/her financial obligations and be attributed a credit rating substantially different from the person who filed for bankruptcy.

This suggestion received support from a large number of participants.

To this comment, a representative from the credit rating agency "Equifax", added that his agency is committed to finding mutually satisfying solutions to such problems by entertaining regular meetings to further discuss these issues. He further clarified the misconception surrounding the credit rating practice and explained that it is the creditor or lender and not the credit rating agency who attributes the rating to an individual's file; this rating is then used in the industry as a benchmark for lenders to determine whether the person seeking credit is considered a risk. Where an individual is rated as a high risk, that person's file is monitored and treated differently than from a person who had been attributed a good credit rating. Finally, he explained that an individual who has been attributed a poor credit rating may make a note on his file explaining the reasons for which he/she was prevented from complying with his/her financial obligations.

A few participants suggested that it would be useful for credit rating agencies to develop a pamphlet on the issue of credit rating practices.

> *It was proposed that credit rating practices be amended in order to distinguish between those individuals who choose to file a proposal and those who opt to file for bankruptcy.*

On the issue of threshold, comments were made to the effect that even though the ceiling limit in summary administrations had recently been raised from five thousand dollars to ten thousand dollars, some participants felt it could still be raised higher.

On the issue of **Division II, Consumer Proposals**, it was suggested that the definition of "consumer debtor" in section 66.11 of the *BIA* be amended to increase the existing threshold of seventy-five thousand dollars to two hundred and fifty thousand dollars, as is the case in the United States.

Participants also agreed that all proposal forms include a table of comparison outlining the potential returns to creditors in a bankruptcy versus the potential returns to creditors in a proposal.

> *It was suggested to amend the existing threshold of Division II Consumer Proposals from seventy-five thousand dollars to two hundred and fifty thousand dollars and that a table of comparison*

outlining the potential returns to creditors be included in all proposal forms.

The **Discharge Process** was next discussed. In cases of first-time individual bankrupt, where the Superintendent, the trustee or a creditor does not oppose the discharge of the bankrupt in the nine month period immediately following the bankruptcy the bankrupt is automatically discharged. However, where a creditor does intend to oppose the discharge, it was suggested that the opposition be made in the form of a Notice of Intention to File an Objection. Upon being notified of such intention, the trustee could then resort to some form of informal mediation process which would require advising all interested parties and schedule a meeting or a conference call in order to attempt to reach a settlement prior to appearing in court. It was said that this approach might contribute to reduce the current lengthy delays for obtaining a hearing date.

It was suggested that the BIA be amended to introduce a Notice of Intention to File an Objection in cases where creditors want to oppose the bankrupt's discharge.

Other **Miscellaneous Issues** were discussed and the following amendments were suggested:

- re-instate the former Notice of Requiring Persons to Prove Claims with the date of bankruptcy mentioned therein;
- include the term "services" in paragraph 178.(1)(e) regarding undischargeable debt or liability for obtaining property by false pretences or fraudulent misrepresentations;
- formally recognize alternative ways to conduct meetings of creditors (i.e. conference calls, video-conferencing, etc.); and
- introduce a provision which would provide that debtors who have incurred a large amount of debt towards credit card companies, while knowing that they were insolvent be made to reimburse amounts incurred and that such actions be made as offences.

1.2. The Realization of Assets and the Statement of Affairs

Creditor representatives observed that there were rarely any jewellery indicated on the **Statement of Affairs** ("SOA"). To this comment, trustees replied that jewellery and furniture are often considered "dignity issues", in that these objects have a sentimental

value for the owner and not necessarily a market value. For this reason, they were seldom included in the SOA. Trustees did, however, remarked that in cases where the jewellery in question did represent a significant value, they were included in the SOA as part of the debtors' assets.

Moreover, it was suggested that as an industry driven initiative, creditors should be encouraged to share information amongst themselves. It was further suggested that trustees resort to the professional services of independent appraisers, especially for vehicles and other valuable assets.

An incidental comment was made to the effect that the recently amended tariff for summary administration estates was likely to have a positive impact and motivate trustees to realize more assets.

It was suggested that trustees resort to the professional services of independent appraisers, especially for vehicles and other valuable assets.

2. Service Standards

On the issue of **Service Standards**, it was suggested that the trustee's performance be evaluated on the rate of dividends paid to creditors. Some participants objected to this suggestion arguing that such an approach might lead to trustees "cherry picking" the files they accept, which could translate in an accessibility problem for debtors. It was further mentioned that the insolvency community might not want to encourage such behaviour as it was seen by some as inconsistent with the intent of the *BIA*: to provide to those individuals, who require the services of a trustee, accessible professional services in matters pertaining to bankruptcy. Another participant added that this type of score card may be difficult to implement and use as an objective measure for a trustee's performance given that dividend to creditors vary greatly depending on the bankrupt's socio-economic status and his/her geographic location. A final comment was made suggesting that the OSB establish a National Call Centre for answering debtors and creditors enquiries.

While some participants suggested that trustees' performance be evaluated on the rate of dividends, others cautioned that adopting such a practice could result in an accessibility problem for debtors.

Part Two
Commercial Insolvencies

Summary of Discussions & Key Points

1. The Efficiency of the Current System

1.1. Streamlining the Existing System

The same questions were put to commercial and corporate participants about ways to improve the existing insolvency system and make it more efficient and less time-consuming.

When asked about the efficiency of our insolvency system, corporate and commercial participants were concerned with the issue of **Meetings of Creditors**. It was suggested by a large number of participants that the mandatory nature of holding meetings of creditors be repealed and replaced with a more flexible approach based on creditors' preferences. It was suggested that in cases where there are no contentious issues and/or where there exists no assets, eliminating this step would streamline the process greatly. Other participants did not agree with this suggestion and argued that these meetings provide an excellent means for creditors to exchange information and raise important issues. It was said that oftentimes, these meetings are the only way small creditors are kept apprized of a debtor's affairs.

> *As a way to streamline the process, it was suggested that the BIA be amended in order to abolish the mandatory requirement to hold meetings and allow for a more flexible approach based on the specific circumstances of a case.*

On the question of **Examinations**, it was proposed that Official Receiver be provided with a list of questions which they would be required to ask the debtors during an examination. Some participants commented that in their view, the Official Receiver examination was the most cost-effective way of undertaking a thorough review of the debtor's activities and affairs. Some participants suggested that Official Receiver examinations be administered to officers and directors in all corporate bankruptcies.

A number of participants commented that in their view, the Official Receiver examination was considered the most cost-effective way of undertaking a thorough examination of the bankrupt's activities and affairs.

On the issue of **Proposals**, it was suggested by some participants that the *BIA* be amended in order to repeal the deeming provision of bankruptcy which takes effect when a debtor fails to comply with the conditions expressed in the proposal, or following the creditors' rejection of said proposal. Some participants felt that by eliminating the latter, debtors would be encouraged to file Division I Proposals.

Moreover, some participants questioned the necessity for the court to approve such proposals stating that although the court approval provides creditors with some reassurance, other alternatives might be more cost-effective and less time-consuming. As an alternative, it was suggested that the existing process be amended to incorporate a time frame where interested parties who did not agree with the proposal could object: where no objections were filed within a prescribed time frame, the proposal would be deemed to have been approved by the court.

As a way to encourage debtors to file Division I Proposals, it was suggested to amend the BIA to remove the deeming provision of bankruptcy which takes effect when the debtor fails to comply with the conditions set out in the proposal or following the creditors' rejection of said proposals.

On the issue of **Compliance**, participants commented that the *BIA* lacks stiff sentences where offences are being committed. Moreover, it was purported that where investigations were being conducted by the RCMP, the time frames were too long.
As a way to reduce the current delays, some participants suggested that consideration be given to hire forensic accountants to prepare the Investigative Report which could then be forwarded to the RCMP for action.

In order to expedite RCMP investigations, it was suggested that forensic accountants be hired to prepare the Investigative Report and submit it to the RCMP for action.

2. Current Issues in Commercial Insolvencies

2.1. Unpaid Suppliers

When asked to comment on the current issues in commercial insolvencies, participants had different views regarding the application and wording of section 81.1 of the *BIA* which refers to **Unpaid Suppliers**. Some participants advocated that the provision should be repealed altogether as it provided an illusory protection to unpaid suppliers. It was explained that oftentimes it is not economically feasible for an unpaid supplier to reclaim possession of goods which have been scattered across the country since their delivery to the debtor. Others commented that the provision had a paralyzing effect on businesses in that, suppliers were less likely to deliver goods on credit and bankers where less receptive to lend monies to businesses which dealt with large amounts of supplies.

Participants further commented that the problems surrounding the issue of unpaid suppliers and that of fraudulent acquisitions has been identified a long time ago, yet had never been addressed directly. As a way of discouraging the current practice of debtors loading up on supplies prior to declaring bankruptcy, it was suggested that the *BIA* be amended to recognize that directors and officers be held personally accountable where such event took place. As an additional deterrent, it was proposed that all unidentified goods which have been delivered within 30 days or, within 30 days preceding the bankruptcy, be allocated to suppliers who had proven their claims on a pro rata basis.

It was suggested to amend the BIA in order to afford unpaid suppliers adequate protection.

2.2. Asset Rollovers

On the issue of **Asset Rollovers**, commonly referred to as "flip-flops", it was proposed to modify the OSB's Name Search Registry in order to include names of former directors and officers of bankrupt corporations. It was said that this addition would be helpful to lenders when deciding whether to lend funds to individuals who had previously been associated with a bankrupt business in the past. Participants also noted that asset rollovers where to be distinguished from fraudulent transactions. It was said that asset rollovers were a question of perception, the main issue being how do we identify those asset rollovers which are fraudulent and those which are beneficial to creditors and the estate in general ?

Another related problem identified referred to the so-called non-arms length *Personal Property Security Act* (PPSA) asset rollovers. It was reported that in some cases, where a

given person holds security on his own company, he/she can foreclose at any given time: the resulting effect being that a new owner has been nominated by virtue of the security agreement without notices being given or appraisals being conducted. In such cases, unpaid suppliers are left without protection as such transactions do not come within the ambit of the *BIA*, as they are not bankruptcies *per se* nor are such transactions reported to the Superintendent. Accordingly, three (3) solutions were proposed to preclude these situations from occurring:

- It was suggested that the OSB bring a test case before the court in order to determine whether an asset rollover can be assimilated to a receiverships for the purposes of the *BIA*;
- Proceed with an 'oppression remedy' in accordance with the *Ontario Business Corporations Act*; and/or
- Inform provincial representatives of this situation in order that they may consider amending the PPSA accordingly.

As another solution, it was proposed to incorporate an "anti-flip" provision in the *BIA*. To this end, it was suggested that we refer to the *Income Tax Act* which prohibits, under certain circumstances, a person from dealing with their property when related.

On a positive note, it was said that in some cases, asset rollovers can be a good thing provided the assets in question are rolled over at the best possible value and that the transactions are done openly with creditors and the estate.

> *In order to specifically address the issue of perception and transparency, it was suggested to amend the BIA in order to incorporate a provision dealing with asset rollovers.*

2.3. Receiverships

With respect to **Receiverships**, it was purported that the current practice reveals that very few receiverships are being reported. Moreover, some participants felt that the insolvency community needed particular norms of conduct to apply when acting as a receiver. Finally, it was proposed that receivers be required to hold proper qualifications and/or designation such as that of a trustee, lawyer or accountant.

It was proposed that receivers be required to hold proper qualifications and/or designations such as that of a trustee, lawyer or accountant.

2.4. International Insolvencies

Participants briefly discussed the newly enacted Part XIII of *BIA* on **International Insolvencies** which is based largely on an earlier version of the United Nations Commission on International Trade Law (UNCITRAL) Model Law. It was mentioned that one of the questions for the next round of legislative amendments to the *BIA* should include that of whether Canada should adopt the new version of UNCITRAL. It was purported that the United States has pushed along a similar initiative in a relatively short period of time through proposed amendments to Chapter 15 of the *U.S Bankruptcy Code*, which are almost a verbatim copy of the UNCITRAL Model Law. It was their opinion that Canada should look favourably upon adopting the provisions of the UNCITRAL Model Law which deals with international insolvencies.

One final question was raised and will certainly warrant some consideration in the next round of amendments: How can domestic regulators such as the OSB continue to exert regulatory supervision over foreign representatives coming into Canada who deal with assets or otherwise take part in the administration and liquidation of estates ?

It was said that the next round of legislative amendments to the BIA should include the question of whether Canada should adopt the new version of the United Nations Commission on International Trade Law Model Law.

Part Three

The Time For *Action*

As you are aware, Phase I of the *Bankruptcy and Insolvency Reform* emerged in 1991 with *Bill C-22*. Phase II culminated in the enactment of *Bill C-5*, which was based largely on the Bankruptcy and Insolvency Advisory Committee (BIAC) recommendations in April 1997. Having now completed the National Insolvency Forum for the six (6) identified regions, the OSB must now draw from the numerous suggestions, a selected few which

will be comprised in the Action Plan for the coming millennium.

The OSB will base its selection on various criteria such as the feasibility of the suggestion, the resources necessary to implement the suggestion, and whether the suggestion is in keeping with Government and/or OSB objectives and priorities.

Part Four

Executive Summary

Fiscal constraints and the pervasive question of *What taxpayers are getting in return for their investment in various government programs* have prompted the questioning and rethinking of traditional approaches to the role of government and how it does business.

While it is true that Integrity is the cornerstone of our insolvency system, it is also true that information on performance and efficiency is required for good management and effective governance. Knowing how well programs are doing is increasingly essential to managing today's public sector, as our government faces resource reductions and a citizenry that continues to expect good value from its government.

Although amendments made to the *BIA* during the 1992 and 1997 reforms have come a long way in improving Canada's insolvency system, during the course of the NIF round-table discussions the OSB was made aware of a number of outstanding issues which warrant its attention in order to further improve the system. We have attempted to paraphrase those suggestions and recommendations made by both consumer and commercial insolvency representatives, in the following Executive Summary.

When asked *How to improve and streamline the process*, consumer representatives had a number of suggestions. The discussion opened by referring to **Proof of Claims**. Although some found that completing the prescribed form was somewhat tedious, others believed that it was an important document in that it validated a creditor's right to participate in the bankruptcy. However, most stakeholders did agree that creditors should be entitled to electronically file their proof of claims.

On the issue of **Credit Rating Practices**, participants commented that the current system makes no distinction between those individuals who choose to file for bankruptcy and those who opt to file a proposal and therefore, suggested the practice be amended.

Participants further commented on the issue of **Division II, Consumer Proposals**, it was

suggested to increase the existing threshold from seventy-five thousand dollars to two hundred and fifty thousand dollars.

With respect to the **Discharge Process,** it was suggested that the *BIA* be amended to introduce a Notice of Intention to File an Objection in cases where creditors want to oppose the bankrupt's discharge.

On the subject of **Realization of Assets and Statement of Affairs,** participants suggested that trustees resort to the professional services of independent appraisers, especially for vehicles and other valuable assets.

As well, on the issue of **Service Standards**, while some participants suggested that trustees' performance be evaluated on the rate of dividends, others cautioned that adopting such a practice would result in an accessibility problem for debtors.

When asked to comment on current issues in commercial insolvencies, participants first discussed the issue of **Meetings of Creditors**. As a way to streamline the process, it was suggested that the *BIA* be amended in order to abolish the mandatory requirement to hold meetings and allow for more flexibility based on the specific circumstances of a case.

On the question of **Examinations**, a number of participants commented that in their view the Official Receiver examination was considered the most cost-effective way of undertaking a thorough examination of a bankrupt's activities and affairs.

Insofar as **Proposals**, as a way of encouraging debtors to file Division I Proposals, it was proposed to amend the *BIA* to remove the deeming provision of bankruptcy which take effect when the debtor fails to comply with the conditions set out in the proposal or following the creditors' rejection of said proposals.

On the issue of **Compliance**, it was suggested, as a way to expedite RCMP investigations, that forensic accountants be hired to prepare the Investigative Report and submit it to the RCMP for action.

Regarding **Unpaid Suppliers**, it was suggested to amend the *BIA* in order to afford unpaid suppliers adequate protection.

With respect to **Asset Rollovers**, it was suggested to amend the *BIA* in order to incorporate a provision dealing with this issue in order to specifically address the issue of perception and transparency.

With respect to **Receiverships**, it was proposed that receivers be required to hold proper qualifications and/or designations such as that of a trustee, lawyer or accountant.

As a final point discussed, participants touched on the issue of **International Insolvencies** and commented that the next round of legislative amendment to the *BIA* should include the question of whether Canada should adopt the new version of the United Nations Commission on International Trade Law Model Law.

Part Five

Conclusion: The Way *Ahead*

The publication of this report marks an important step in the OSB's commitment to streamline and improve Canada's Insolvency System.

This series of NIF conferences has provided the OSB with insightful information on how to improve the existing Insolvency System. The OSB will now begin considering which suggestions can be implemented in the absence of legislative amendments through the issuance of *Circulars, Directives* and voluntary codes of conduct. With the next legislative review in 2002 just around the corner, proposals requiring legislative changes to the *Bankruptcy and Insolvency Act* will be formally submitted to the Corporate Law Policy Directorate of Industry Canada.

It is with your co-operation, through this type of round-table discussion, that the OSB, together with Industry Canada, will continue striving towards a business-like bankruptcy service which provides high-quality, trusted, timely and efficient services, consistent with its mandate.

We would like to reiterate our gratitude for your participation in the National Insolvency Forum (NIF). The Toronto Conference was well attended and the suggestions for change and improvement to Canada's Insolvency System were very much appreciated.

Thank you, once again.

SUMMARY OF DISCUSSION PAPERS SUBMITTED BY PARTICIPANTS

DISCUSSION PAPER #1
Submitted By: The Canadian Bankers Association

STREAMLINING (consumer proposal)

- Subsection 66.12 (2) of BIA should be amended to allow creditors to oppose a debtor moving from Division I to Division II. This will make it clear that debtors who have no intention of going through with a proposal cannot stop proceedings under one Division of the BIA and move to another Division, frustrating creditors in the process.

- Subsection 128 (1.1) of BIA should be amended to require due diligence on the part of the trustee in providing full names and addresses of any person holding security interests. For example, if an incorrectly addressed notice is received by a large organization, it may well find itself outside of the thirty-day response period and lose its security.

- Section 66.2 of the BIA, regarding supervision of consumer debtors' affairs, should be amended to remove the requirement for obtaining the consent of the consumer.

TRUSTEES OFFICES

- A better consistency on the part of the trustee in addressing the spirit and intent of the legislation would improve the effectiveness of the BIA. The CBA recommends a consistent direction to trustees that they should immediately retrieve all collateral and credit cards and advise banks immediately of these measures.

- Some trustees take possession of collateral and often store it in private locations which incurs exorbitant storage costs for the financial sector. In addition, the delay in notifying the creditor of the fact of possession and location of the collateral exacerbates the problem.

DISCUSSION PAPER #2
Submitted By: Equifax

QUALITY, TIMELINESS AND COSTS OF INFORMATION RECEIVED BY THE OSB

- Only about one half of the information is received in a form which allows it to be added to the Equifax database in an automated fashion. The OSB should put procedures into place which ensure that information entered by department officials for circulation to both the general public and the credit reporting agencies is as accurate and complete as possible. In

addition, it would be helpful if the OSB would provide information such as "trade style" and "trade names" when an individual who has operated an unincorporated business is filing under the BIA.

- Bankruptcy-related information must be delivered in a timely and accurate manner if it is to be a useful tool to credit grantors. This information must be made available on a real time basis. The OSB should consider converting their system to allow for such information to be sent on a daily basis via the Internet.

- Several months ago, the OSB imposed a very substantial user fee for obtaining bankruptcy-related information. The OSB should opt to maintain the current rates it charges for information. These increased funds should be reinvested in a manner that will ensure enhancement of the product being delivered.

ON-LINE CREDITOR AND DEBTOR LISTS

- This information should be made public immediately upon same being compiled by the appointed receiver or trustee. Such information should be made available by means of a universally accessible web site at no charge to the general public. The current system tends to favour one class of creditor over others. The OSB initiative should strive to ensure greater equity in the dissemination of information, a concept which certainly would be appropriate and fair.

DISCUSSION PAPER #3
Submitted by: John Owen, A.C.I., Omega-One Limited

CONSUMER ISSUES: EFFICIENCY OF THE CURRENT SYSTEM

I) PROOF OF CLAIM

The content requirement for the proof of claim Schedule A should be clarified.

- Allow a 90-day history to support a claim.

- Allow professional filers and employees of established institutional creditors the right to provide only the Proof of Claim declaration (without a Schedule A). As a control, it might be necessary to register claimants who are approved for this right.

II) CREDITORS' SIGNATURES

Institutional or professional filers should be allowed to "sign" their claims electronically

or mechanically.

- Professional filers might be required to register with the OSB and provide an example of their signature, or they could be given a registration number as a signature alternative.

III) TRUSTEES' REQUEST FOR ORDINARY TARIFF

We have seen instances where trustees have applied for and been granted orders for conversion from summary to ordinary administration. At the end of the administration there were no dividends payable to the creditors, as the entire value of the property was offset by increased tariff.

- Any application for tariff conversion should be accompanied by an estimate from the applicant trustee to show how the creditors will benefit.

IV) NOTICE REQUIRING A PROOF OF CLAIM

The so-called "30-day" (sec. 149) notice is not required to show the date of bankruptcy. This is not within the spirit of the Act which is to give creditors who lost a creditor package an opportunity to file upon the receipt of the Sec. 149 Notice.

- Section 149 Notices should be required to show the date of bankruptcy.

- Section 149 notices should be mailed separately, not as part of the creditor package. They should be sent out as soon as a dividend is expected, but after initial filings have been received, say 90 days after assignment, but before the 170 report is due.

- They should be sent only to creditors that have not claimed, but are disclosed by the bankrupt (or are otherwise known to be a creditor).

- Trustees should not be allowed to opt out.

V) CONSUMER PROPOSALS

1. Opposition

The normal reasons for Opposition to Discharge of a bankrupt do not apply to a Consumer Proposal debtor. A creditor with a concern may vote against the consumer proposal but will be unable to sustain the vote unless he can meet the voting formula.

- We recommend that every consumer proposal be required to contain provision for the return of any goods purchased on credit within 90 days of the date of the proposal.

2. Administrator's Opinion

In Commercial Proposals, the trustee is obligated to express an opinion in the Report to Creditors as to the relative benefits of the proposal compared to a bankruptcy.

- We recommend that Consumer Proposals be required to present this type of comparison, together with the Administrator's opinion that the Consumer Proposal is more beneficial to the unsecured creditors than an equivalent bankruptcy.

3. Secured Creditors

Certain high-risk creditors are using their secured status to deprive consumers, and probably bankrupts as well, of the cash flow needed to fund a viable proposal.

- Consumer Proposal Administrators should insist on realistic property valuations.
- Secured creditors should be entitled to receive from the proposal 100 cents on the dollar of the fair security value, over the lifetime of the proposal.
- Secured creditors should be allowed to file a parallel claim for any projected deficiency amount to rank as unsecured and subject to the same payout ratio as other unsecured creditors. If the creditor chose instead to rely on the security, then the Administrator would be empowered to disallow any subsequent claim for deficiency.
- The property valuation should be the realistic NET value after making allowances for repossession costs, storage and auction fees.
- Direct payments by the debtor to the secured creditor should not be allowed.

VI) NOT FOR PROFIT CONSUMER PROPOSALS

Some provinces have allowed their Consumer Relations staff to become Administrators for Consumer Proposals under Part III of the BIA.

- We recommend that the OSB invite selected Credit Counselling Services (CCS) staff to qualify as Administrators of Consumer Proposals under the BIA.

SERVICE STANDARDS

I) Trustee Service Standards

The Act tries to balance the sometimes conflicting requirements of providing protection and rehabilitation to bankrupt debtors with locating and distributing all the bankrupt's non-exempt property to the creditors.

- All trustees should be subject to reporting the creditor dividends (after estate expenses) as a percentage of proved, unsecured claims. This could be part of the 170 report.

- A running total should be kept so that trustees' longer-term performance (in support of creditors) can be gauged.

- Some trustees favour debtors while others support the creditors. A ranking system would tend to eliminate these perceived inequities.

II) Creditor Inquiries, How to Inform Them of Their Rights, Etc.

The OSB was the driving force behind the study course and accreditation for "Insolvency Counsellors".

- A similar course and accreditation might be introduced for creditor staff. Note that the Credit Institute of Canada has within the Fellow of the Credit Institute (FCI) program a comprehensive module on bankruptcy.

III) OSB Standards

We have always found our contacts with the OSB at any level to be efficient, courteous and practical. Our only worry is that the OSB's need to address full cost-recovery may impair the current standards.

NON-AGENDA ISSUES

I) Low-Income Bankrupts

A large portion of consumer bankruptcies show a Statement of Affairs with a current deficit in the family income and expense line. Income of $1,500 and expenses of $1,800 per month are not unusual. Note that this deficit is after the removal of debt/service costs for unsecured debts. These individuals are technically bankrupt a second time before they

qualify for their first discharge. Yet, in nine months they will be able to go out and incur credit expenses all over again. A half-hour counselling session is not enough for them.

- Discharges to be granted automatically only if supported by a "life-skills" plan which would include a balanced family/personal budget.

- Consumer bankrupts who are unable to balance their budgets would have their discharges delayed until the shorter of (say) five years, or until the life skills plan had created an increase in income, or a reduction in expenses leading to a balanced budget.

- Ideally, the extended discharge period and the development of the life skills plan would be accompanied by professional guidance.

II) Reason for Bankruptcy

Many consumer bankrupts in the above category are identified by the trustee in "reasons for bankruptcy" as having too much credit. Since these people still show a deficit after the removal of all unsecured debt payments, this reason cannot be completely accurate. Indeed, the accumulation of consumer debt has probably delayed the bankrupt's decision to seek assistance of an insolvency professional.

III) Trustee's Tariff

The current tariff scheme discourages certain high volume trustee firms from providing a dividend to creditors. Their price structure assumes an income stream of about $1,200 per bankruptcy. We may assume that about $500 of the $1,200 is income for the trustee after expenses.

- We would like to see this income level structured in such a way as to create an incentive for the trustee to provide at least a minimal return to creditors.

- An example of a revised tariff should provide for only $ 500 at 100%, but with an increased percentage for amounts over the base:

  100% of the first $500
  50% of amounts between $500 and $2,000
  30% of amounts between $2,000 and $5,000
  20% of amounts over $5,000

- By this tariff, a trustee would still be able to earn $1,200 by requiring the bankrupt to pay $1,900 with $700 being distributed to creditors.

DISCUSSION PAPER #4

Submitted By: The Corporate Law Policy Directorate, Industry Canada

This paper outlined the consultation and policy development process that Industry Canada intends to pursue during the next phase of reform to the BIA and CCAA, and will discuss some of the key issues that will need to be addressed in the latest phase.

THE PROCESS

In the first phase of bankruptcy reform, a two-stage process was followed. In the first stage, an Advisory Committee on Bankruptcy and Insolvency was created by the Minister of Consumer and Corporate Affairs. The Committee was tasked with examining the bankruptcy and insolvency system, assessing possible reforms and recommending amendments to the *Bankruptcy and Insolvency Act*. This was followed by a second stage, of largely bilateral consultations and negotiations between the Department of Consumer and Corporate Affairs and insolvency stakeholders. The result was Bill C-22, which finally emerged in 1991. The bilateral consultation process employed in the second stage of Phase 1 proved cumbersome and inefficient.

In Phase 2, Industry Canada sought to overcome this by carrying out its consultation through a Bankruptcy and Insolvency Advisory Committee (BIAC) in which all key insolvency stakeholder groups were represented. BIAC was tasked with providing for the exchange of advice and information, identifying insolvency issues and proposing solutions and providing feedback on government policy and legislative proposals, in addition to building a consensus to facilitate change. Phase 2 culminated in the enactment of Bill C-5, which was based largely on the BIAC recommendations, in April 1997.

Our challenge in Phase 3 is to establish a consultation and policy development process that retain the many benefits of the BIAC process while addressing some of the issues left unresolved. Industry Canada is planning a two-stage policy development/consultation process. In the first, pre-consultation stage, the Department will produce a series of discussion papers for distribution to insolvency stakeholders in 1999-2000. These papers will set out the issues which we believe must be addressed to ensure that our current insolvency laws provide a modern, efficient and effective legal framework. During the second stage, stakeholders will be invited to submit their comments, their own priority issues and position papers. Policy review sessions will then be held in various localities across Canada as warranted by the subject matter. The policy review sessions will be a key element of the consultation process.

Sessions will focus on the stakeholders' concerns and views as to how issues should be addressed. We expect the first round of policy review sessions to be completed early next year. The Department will then revise its discussion papers and arrange a second set of review sessions later in 2000. This process may be repeated for additional issues and policies through to the end of 2001, at which time a final report will be drafted. This process will allow for effective participation by non-experts and regional stakeholders. Furthermore, it will force the development of feasible preliminary options with respect to contentious issues and an initial overall review of the major elements of insolvency law in

Canada.

SOME KEY ISSUES

A) Consumer Issues

1. Exemptions for RRSPs and personal property

Both issues will be discussed: whether to exempt RRSPs in bankruptcy, and whether to replace the current personal exemption provisions, that adopt provincial rules, with a federal code.

2. Availability of credit, and debtor and creditor responsibility for high consumer debt

The issues are whether, and if so how, to discourage easy credit for high risk consumer debtors and whether, through legislation, to impose responsibility on consumer debtors or lenders or both.

3. Student loans

The 1997 and 1998 amendments to the BIA enacted a non-discharge ability period for student loan debts. However, student representatives have been critical of it and the Canadian Federation of Students has announced its intention to challenge the extension under the Charter of Rights.

B) Commercial Issues

4. Stays of Proceedings in Commercial Reorganizations

The BIA provides that the court may lift a stay imposed on a creditor in a BIA proceeding if it is satisfied that the creditor will be materially prejudiced. The issue is whether to establish more precise rules regulating the availability of stays in Canada.

5. Contractual Rights in Reorganizations and Bankruptcies

In Phase 3 we need to examine whether to further modify existing rules or to establish specific rules governing termination or adoption or enforcement of other types of contracts, including technology contracts, collective agreements and supply contracts.

6. Debtor Financing During Reorganizations

Obtaining financing is a critical concern of debtors seeking to reorganize under the BIA or CCAA. An issue for Phase 3 is whether to provide stronger protection to providers of credit to insolvent debtors during BIA or CCAA reorganizations in order to enhance the availability of credit.

7. Consolidation of the BIA reorganizations scheme and the CCAA

The question has been raised as to the need for a separate statute to deal with reorganizations of large corporations. The question is whether to bring the CCAA into Part III of the BIA.

8. Director/Officer Responsibilities

Directors are exposed to liability for specific types of claims, such as tax and wage claims, under a variety of federal and provincial statutes. Most directors' liability legislation gives directors due diligence defences against liability. One issue is whether to provide stronger protection to directors in insolvency cases to encourage directors to continue guiding a company through a restructuring. Another issue is whether to provide additional constraints on directors whose conduct is below a certain standard. One such constraint could be to restrict the ability of principals of a bankrupt company to acquire its assets and set up a business again. Another could be to provide for disqualification of directors and officers who are responsible for bankruptcies.

9. Vantage Securities

The task now is to determine the facts of this complex case to see if they raise issues whose resolution requires amendments to the BIA.

C) Priorities

10. Crown priorities - Workers Compensation Board (WCB) claims and tax claims

Difficult Crown priority issues remain outstanding for Phase 3: federal and provincial treasuries want stronger protection for GST and sales tax claims. Some provinces want better protection for property tax claims and WCB claims. On the other hand, the private sector remains opposed to any expansion of Crown priorities and has expressed some concern about recent legislation intended to strengthen existing priorities.

11. Wage claims

The question remains as to whether and, if so how, to provide better protection to wage earners in their employers' bankruptcy and who should bear the cost - other creditors

through a super priority provision or taxpayers (and if so, which taxpayers - employers, employees or taxpayers generally?) through a fund.

12. Unpaid supplier claims

The provisions concerning unpaid suppliers have been criticized as providing limited and uncertain protection - they apply to goods only, not services and only if the goods have not been altered or resold since delivery. The issue is whether to improve the status of supplier claims in bankruptcies and reorganizations.

13. Consumer liens

We need to consider whether there is a need to improve the status of claims of consumers for goods paid for but not delivered by insolvent businesses.

14. Wage assignments

When the Phase 2 amendments were before Parliament, the credit unions, who rely on wage assignments as security, sought to have the 1992 amendments repealed and wage assignments again made enforceable in bankruptcy. They also stated that wage assignments were one of the few types of security which many of their customers could give and that restrictions on it reduced the credit available to those customers. The issue in Phase 3 is whether to reinstate the enforceability of wage assignments in bankruptcies.

D) Other Issues

15. Adopting the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvencies

UNCITRAL developed a Model Law on Cross-Border Insolvencies, which was adopted by the U.N. General Assembly in late 1997. Canada was an active participant in the

UNCITRAL discussions. During Phase 3, we need to consider whether we should adopt the UNCITRAL Model Law on Cross-Border Insolvencies.

16. Consolidation of legislation governing insolvencies of financial institutions

The Winding-Up and Restructuring Act has been substantially amended to make it an adequate vehicle for financial institution liquidation. Given that Finance has the lead on whether to further modernize the WURA, what Industry Canada needs to consider is whether to restrict the application of the Winding-Up and Restructuring Act to financial institutions.

17. Trustee Liability

The 1997 amendments, including provisions protecting a trustee who carries on the business of a debtor or continues employment of the debtor's employees from liability for claims arising before his appointment, have been criticized as being ineffective to protect a trustee. In this round of reform, we need to examine whether to address the issues raised by St. Marys Paper by providing further protection to trustees and receivers.

18. Preferences and Settlements

The issue for Phase 3 is whether to consolidate and modernize Sections 91 to 101 of the BIA in the way the 1975-84 omnibus bills would have made more far reaching changes to those provisions.

DISCUSSION PAPER # 5

Submitted By: The Canadian Bankers Association

COMMERCIAL BANKRUPTCIES & PROPOSALS

I) STREAMLINING

- There should be common service delivery standards for Insolvency Professionals. Banks find a wide variety in the quality and timeliness of reports received from IPs which makes it difficult for banks to respond and participate effectively in the process.
- Brief interim reports should be made available to all creditors indicating progress made in finalizing the bankruptcy.
- An updated asset and liability report should be provided after claims have been proven and assets have been formally appraised or investigated.
- Attendance at a meeting of creditors should not be necessary, except in cases of fraud, missing assets, etc.
- Time frames for voting on a proposal seem too short as it appears the documents are not always mailed promptly.

II) RECEIVERSHIPS

- Registration and compliance with the receivership provisions of the BIA are onerous for some businesses. In many instances, the cost of appointing a receiver to meet BIA requirements exceeds the realizable value of the assets held as security.

III) ENVIRONMENTAL LIABILITY

- The CBA opposes any "super-priority" liens which change the priority scheme that is relied upon by secured creditors.
- The scope of any super-priority for environmental clean-up costs must be strictly limited
- Limiting the super-priority on a site-by-site basis to the "affected property" only, is the best solution.
- The words "is contiguous thereto" [subsection 14.06(7)] should be replaced by "has a common boundary therewith".

IV) INTERNATIONAL INSOLVENCIES

Any BIA international insolvency amendments should not:

- interfere with the discretion of Canadian judges;
- impact on the flexibility of courts to deal with debtors and assets located in Canada;
- facilitate the importation of foreign bankruptcy laws;
- introduce uncertainty into domestic lending transactions or the taking of security;
- constitute leading edge cross-border insolvency legislation.

V) DEBTOR IN POSSESSION FINANCING

- The courts are now exercising inherent jurisdiction to grant super-priority charges over existing lenders to secure financing for businesses that are now under reorganization. It will be important for the banks as lenders that the criteria for such super-priority financing be better defined in restructuring legislation.

VI) DIRECTORS' OBLIGATIONS

Directors should:

- be given a degree of protection in insolvency situations from strict liability for claims such as wages and source deductions which can arise without the fault of the directors;

- have a fiduciary duty to consider the interests of creditors as well as shareholders.

VII) LEASING

- Clearer and more consistent rules governing leases of personal property should be

developed. For example, there is considerable uncertainty as to what happens when a lessor goes bankrupt. It is unclear to what extent lessors are secured creditors for the purposes of the BIA and the CCAA. There is no process for retaining or disclaiming personal property leases. Addressing these issues should simplify leasing financing.

VIII) PRIORITIES

- The new super-priority for source deductions should be limited to current assets.
- The bankruptcy scheme of claims priorities should apply in receiverships.

IX) INTELLECTUAL PROPERTY

- Reform in the area of intellectual property rights would enhance both the lending process and the insolvency process, given the growing importance of intellectual property rights in many businesses.

X) UNPAID SUPPLIER

- Complete removal of the "unpaid suppliers" provision from the BIA (sec. 81.1): this provision has a negative impact on the availability of credit as it reduces the ability of borrowers to pledge inventory as security for advances of credit, thereby curtailing access to inventory and operating financing.

DISCUSSION PAPER # 6

Submitted By: Andrew Kent of McMillan Binch, Barristers and Solicitors

I) INTELLECTUAL PROPERTY

- Intellectual property rights are almost not addressed in the BIA.
- Reform in this area would enhance both credit granting and the insolvency process.
- Enhance ability to preserve intellectual property rights necessary for reorganizations and going concern sales.

II) DEBTOR IN POSSESSION (DIP) FINANCING

- Because of a statutory vacuum, the practice of granting super-priority security to secure funding during CCAA reorganization proceedings has developed.

- *Ad hoc* criteria for availability of super-priority DIP loans inevitably will make secured credit granting (and restructuring) more difficult.

- Authority to grant super-priority security should be validated by statute subject to two limiting principles:

    (1) adequate protection and
    (2) reasonable prior notice.

III) FRAUDULENT CONVEYANCES/PREFERENCES

- Law is obsolete and is a patchwork of archaic and incomprehensible legislation.

- Law provides little practical protection to creditors from abusive behaviour, but complicates the process of lending.

- Goal should be to establish a single national code governing all fraudulent conveyance/preference issues, including the use of oppression remedy in an insolvency context.

- National code should apply to BIA, CCAA and WRA.

- Should evaluate whether different rules should apply to business assets than personal assets.

- Develop simple, basic conflict of law rules, perhaps modelled after the PPSA.

IV) PERSONAL PROPERTY LEASING

- Law applicable when lessor goes bankrupt is uncertain and should be clarified.

- Helpful to clarify extent to which lessors are secured creditors for purposes of BIA, CCAA, and WRA.

- Establish general rules for retaining or disclaiming personal property leases in reorganizations.

V) SECURITISATION

- Securitisation market in Canada might be enhanced by provisions that recognize and

protect "true sale" transactions.

- Clarify the extent to which trusts are or are not subject to being liquidated and reorganized.

VI) OPERATING LOANS

- Vagueness of the rules governing classification of creditors creates problems structuring some operating loans.

- Create rule in which lenders with a first charge on current assets are to be in a separate class (in that capacity) from term lenders or other parties with a second charge on current assets (or a first charge on other assets).

VII) EXECUTORY CONTRACTS

- Canadian bankruptcy system has no general provisions dealing with the retention and disclaimer of executory contracts in a reorganization (personal property leases are a specific example).

- Create provisions that facilitate executory contracts being retained or disclaimed in reorganization proceedings and assigned in going concern sale transactions in an insolvency context.

VIII) DIRECTORS' OBLIGATIONS

- Important to be able to retain and attract competent independent directors for companies that are good candidates for reorganization.

- Directors are currently exposed to strict liability for claims such as wages and source deductions which can arise without any fault of the directors.

- Provide protection for directors for the last cycle of payments but not for arrears that they have allowed to build up.

- Create mechanisms for replacing directors and clarifying their duties in insolvency situations.

IX) VOTING RULES/EQUITY

- Most insolvency statutes impose a double majority voting approval, requiring an absolute majority by numbers as well as two-thirds majority by dollars.

- Eliminate the absolute majority test since development of vulture trading market makes it problematic if not unworkable.

- It would simplify reorganizations if the bankruptcy courts could also deal with equity as well as debt in reorganizations (e.g. section 191 of the CBCA could be incorporated into the BIA and the CCAA).

X) PRIORITIES

- It would be helpful from a lending perspective if the bankruptcy scheme of priorities also applied to receiverships, assuming there was an insolvency. In small commercial bankruptcies this would avoid the duplication and waste of having both receivership and bankruptcy proceedings.

- The super-priority for source deductions should be limited to current assets (inventory and accounts receivable) to simplify term lending.

DISCUSSION PAPER # 7

Submitted By: Goldie Pagnotta, A.C.I., Credit Manager, Data Business Forms

I) Create a *central registry bank or library* administered by the OSB that would compile information on bankruptcy and insolvency from each province by the defunct organization's corporate name, trade style and directors.

- This data bank could be accessible to creditors for general inquiries.
- These inquiries could level the information base with regard to flip flops or asset rollovers, by cross-checking the particular parties to the central registry bank.
- Stakeholders can play a vital role by reporting insolvent companies and the directors that close their doors and walk away from any form of accountability, into this central bank.

II) Create an *Alternative Bankruptcy Resolution* as a means of educating the debtor about all his options and assisting him to avoid facing bankruptcy as the only selection.

- Identification of the issues, problems and weaknesses along with prescriptive requirements, changes and a structured implementation plan would lead to a turn around and ultimately stability.

DISCUSSION PAPER # 8

Submitted By: Charles M. Zizzo, F.C.I. of BDO Dunwoody Limited

I) PROBLEM

- The Bankruptcy and Insolvency Act allows people to obtain advice from trustees, receivers and accountants on how to pay off preferred creditors, how to dispose of assets for personal benefit, how to keep the benefit resulting from the sale of assets, and how to buy back their assets at reduced value and restart their businesses.

II) RECOMMENDATIONS

- Trustees should be obligated to record the date when a company or consumer inquires about the possibility of bankruptcy.

- The trustee must advise the interested party that anything done from that date onward that is not to the benefit of the company, and not in favour of the creditors, would make the principals and/or consumer liable for any reduction of assets. This liability would survive the bankruptcy and be the responsibility of the principals or consumer, and a proposed repayment plan established as part of the bankruptcy.

- Such a debt would be paid in full before any discharge can be given.

- Bankruptcy assets should not be purchased, even under auction, by anyone who is proven to be at less than an arm's length relationship with the principals, including their spouses' relations.

- Full disclosure of any buyer must be given by way of a declaration, accompanied with a penalty for false statements.

DISCUSSION PAPER # 9

Submitted By: E. Bruce Leonard, Cassels Brock & Blackwell

INTRODUCTION

- International co-operation in insolvencies and restructuring seems to be on an accelerating trend. Globalization of business has changed the dynamics of the international restructuring and insolvencies forever.

OPTIONS IN INTERNATIONAL RESTRUCTURING AND INSOLVENCIES

a) The Cost of the Status Quo

- The structural framework for dealing with multinational and cross-border businesses that encounter financial difficulties has hardly evolved from the state it was in several decades ago. The onset of an insolvency case turns a business into a series of disconnected segments in several different countries. It is almost as if a cross-border insolvency system had been set up deliberately to *promote* failures and liquidations.

b) International Treaties and Conventions

- The most logical and obvious solution to improving the current state of international cooperation in insolvencies and reorganizations would be a multinational treaty or convention to deal with insolvencies and reorganizations of multinational businesses.
- Bilateral treaties between countries are another option.
- The difficulty with these treaties is that they become exercises in the negotiation of sovereign rights.

c) Domestic Legislation

- There has been limited domestic legislation dealing with cooperation in international insolvencies and restructuring. The relative infrequency of the actual use of these types of provisions shows that they have not brought about significant changes and improvements

that are needed to deal with the globalization and internationalization of business and commerce.

CHOICES IN MULTINATIONAL CASES

- The choice in a multinational or cross-border insolvency or reorganization seems to be primarily between a primary/secondary jurisdiction structure for an administration on the one hand, and a concurrent/parallel proceedings structure on the other. A primary/secondary jurisdiction model would involve a filing in the primary jurisdiction where the debtor's central operations are located and subsequent secondary filings in other jurisdictions where assets are located. In the concurrent/parallel jurisdiction model, the reorganizing business would file full proceedings in both the jurisdiction where its central operations are located and in other jurisdictions where key assets are located.
- Courts in different countries are capable of cooperating with each other. The key to this increased willingness to cooperate lies in the experience gained from Cross-Border Insolvency Protocols.

THE INTERNATIONAL BAR ASSOCIATION'S CROSS-Border Insolvency Concordat

- Improvement in the international regime for insolvencies and reorganizations seems destined to be derived primarily from the cooperation and coordination of the insolvency community in different countries. Initiatives are being pursued by the Insolvency and Creditors' Rights Committee of the Section on Business Law of the International Bar Association (Committee J). One of those initiatives is the Cross-Border Insolvency Concordat. It is intended to suggest rules applicable to cross-border insolvencies and reorganizations which the parties or the courts could adopt as practical solutions to cross-border issues arising in proceedings in different countries.

THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

- UNCITRAL began in 1994 a study of the feasibility of achieving higher levels of cooperation in the international insolvency area. The objective of the Model Law was to establish a set of uniform principles that would deal with the requirements which a foreign insolvency representative would have to meet in order to have access to the courts of other countries in cross-border cases.

APPLICABILITY OF UNCITRAL MODEL LAW PRINCIPLES TO CANADIAN PRACTICE

The concepts of the Model Law seem largely compatible with the BIA. For example:

- Both the Model Law and the BIA give "foreign representatives" the right to initiate insolvency proceedings and to appear in court in local insolvency proceedings.
- Both contain a presumption of the debtor's insolvency.
- The powers of the courts are relatively similar under both the Model Law and the BIA.
- What remains to be considered are the advantages to international cooperation that might result from making various consequential and ancillary amendments to expand the BIA provisions in certain respects and to reorder the presentation of the Canadian concepts into a form which more closely resembles the format of the UNCITRAL Model Law.

CROSS-BORDER INSOLVENCY PROTOCOLS

- The example of the IBA's Cross-Border Insolvency Concordat has led to an increasing trend toward the development and use of Protocols in cross-border cases. Some Protocols have been successfully used in several recent cross-border cases and prominent international examples of Protocols include two Canada/United States cases.

THE INCREASING COMITY IN CROSS-BORDER CASES

- Because of the developing experience and success with Cross-Border Insolvency Protocols, it would seem that the insolvency community and the courts have taken the matter of the improvement in cross-border cooperation and coordination into their own hands. Several examples of this trend include:

  - A Canadian enforcement of a Chapter 11 stay.
  - The United States recognition of CCAA and BIA stays.
  - Advanced cross-border comity between Canada and the United States.
  - The rejection of "Jurisdictions of convenience".
  - Cross-border plans.

CONCLUSION

- It would seem that the courts in the major trading countries are demonstrating an increased willingness to co-operate with each other and to co-ordinate activities to secure commercially-oriented results in international restructuring and insolvencies.
- The courts, consequently, seem more and more prepared to work toward a framework that encourages co-ordination and co-operation between jurisdictions in multinational cases. They simply need the active and innovative participation of the insolvency community to create structures that are conductive to increasing cross-border co-ordination in multinational cases.
- The examples of co-operation in recent international cases show that, even in the absence of treaty arrangements between countries, a kind of international insolvency custom of co-operation may be developing.

DISCUSSION PAPER # 10

Submitted By: Wayne D. Gray

I) DOES DIRECTORS' LIABILITY FOR UNPAID EMPLOYEE WAGES WORK?

- Because directors have the statutory and practical power to manage or supervise the management of the corporation and therefore have access to all relevant financial information, they know or should know whether the corporation is insolvent or on the brink of insolvency. Moreover, the general policy of the law to place the loss on the person best able to avoid the loss gives rise to directors' liability.

- There are however some limits to this liability. First, it is limited to all debts not exceeding six months' wages payable to each employee for services performed for the corporation while they are directors. Second, the Supreme Court of Canada held that subsection 119(1) of the CBCA does not require directors to pay termination or severance pay to employees. Subsection 119(1) applies to unpaid wages representing a debt for services actually rendered. Finally, if the financial statements do not show a pending insolvency, the director ought, under the law, to escape personal liability.

II) WHAT DOES NOT WORK ABOUT DIRECTORS' LIABILITY FOR EMPLOYEE WAGES?

- Several difficulties arise as a result of the directors' liability for employee wages being treated as part of the corporate law and not insolvency law where it properly belongs. Corporate law liability provisions only apply to corporations formed under that particular statute. Thus, treatment for unpaid wages depends on the provincial statutes and the jurisdiction of their employer. The various overlapping federal and provincial laws imposing directors' liability for unpaid wages create a morass of legal complexity.

III) WHAT IMPROVEMENTS CAN BE MADE TO DIRECTORS' LIABILITY FOR UNPAID EMPLOYEE WAGES?

- The provisions imposing liability on directors for unpaid wages should be moved from the CBCA to the BIA. As a practical matter, the move would recognize the reality that the issue of directors' liability only arises on the bankruptcy or insolvent of a corporation. The corporation is, of course, always primarily liable for unpaid employee wages. It is only if the corporation cannot pay that the employees or the employment standards branch turn their respective guns on the directors.

- Moving the provisions from the CBCA to the BIA would apply a uniform minimum standard for all employees of corporations or other businesses across Canada. Thus, removing the provision from the CBCA to the BIA would immediately make it applicable to the 88% of business corporations formed in Canada.
- A second option is to allow employees to contract out or waive any claim against directors, although this proposal might meet the objection that opting-out will become universal.

- A third option would be to allow directors to avoid liability upon disclosure of the financial position of the corporation to employees or to unions or other representatives representing the employees.

- Finally, the foregoing proposals would remove a current disincentive against hiring employees in the first place. Again, the larger the payroll, the greater the directors' exposure to potential employee wage claims.

- One difficulty with the foregoing regime is that using the BIA to impose liability on directors may be challenged on a constitutional grounds. Instead of being used exclusively to realize on the assets of the insolvent business and distribute them fairly to its creditors, it would be used to impose liability on third parties, the directors of the insolvent corporation. Thus, it will be important for any amendment to avoid the argument that these provisions in the BIA constitute legislation in relation to property and civil rights. However, a legislation which primarily is in relation to insolvency and which has only a necessarily incidental effect on property and civil rights would respect the Supreme Court of Canada judgment in *Multiple Access Ltd* v. *McCutcheon* (1982), 138 D.L.R. (3d).

APPENDIX B

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